

Mercy Health Services North, a Division of Sisters of Mercy Health Corporation and Local 79, Service Employees International Union, AFL-CIO, Petitioner. Case 7-UC-412

May 28, 1993

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Order (pertinent portions of which are attached). The Employer's request for review is granted. After careful consideration of the entire record, the Board has decided to affirm the Regional Director's decision accreting the transferred registered nurses to the existing unit, as we find the result reached by the Regional Director to be in accord with the Board's recently issued decision in *Gitano Distribution Center*, 308 NLRB 1172 (1992).¹

The Employer operates an acute care hospital including a dialysis unit in Cadillac. The Petitioner represents the 110 registered nurses at Cadillac. The Employer moved some of the dialysis work to a new dialysis center in Baldwin which was staffed by two registered nurses transferred from Cadillac. The Employer did not apply Cadillac's collective-bargaining agreement to the Baldwin registered nurses. The Petitioner seeks to have its bargaining unit at Cadillac clarified to include the registered nurses at Baldwin.

The Regional Director, calling the Baldwin facility a "spinoff" of the dialysis treatment unit in Cadillac, found Baldwin to be a satellite of and an integral part of the Cadillac center. Examining traditional accretion factors, the Regional Director concluded that the transferred registered nurses at Baldwin constituted an accretion to the Cadillac unit. In reaching this conclusion, the Regional Director noted that the concern expressed by the Board in accretion situations not to preclude the employees' free exercise of choice as to union representation is mitigated here, since the grouping employed in Baldwin was part of a unit constituency which had selected the union as their bargaining representative.

Subsequent to the Regional Director's decision, the Board issued its decision in *Gitano* in which the Board held that it will no longer apply a partial relocation or spinoff analysis in determining whether the employer is obligated to recognize and bargain with the union as

the representative of the employees at the new facility. Rather, the Board will begin with its long-held rebuttable presumption that the unit at the new facility is a separate appropriate unit. If the Board finds that the presumption has not been overcome—that the unit at the new facility constitutes a separate, appropriate unit—then the Board uses a simple fact-based majority test to determine the bargaining obligation. Conversely, if the Board finds that the presumption has been overcome—that the unit at the new facility does not constitute a separate appropriate unit—then the Board will (absent other facts not here relevant) accrete the employees involved to the existing bargaining unit.

In determining whether the presumption has been rebutted, the Board looks to such factors as central control over daily operations and labor relations, including the extent of local autonomy; similarity of employee skills, functions, and working conditions; degree of employee interchange; distance between locations; and bargaining history, if any. *Esco Corp.*, 298 NLRB 837 (1990).

Applying the analysis set forth in *Gitano*, we find, based on the record evidence, that the presumption of a separate appropriate unit at the Baldwin facility has been overcome.² Cadillac's dialysis unit continues to operate as the Employer's main dialysis center, 7 days a week, 24 hours a day. Baldwin operates only 3 days a week for 13 hours a day. Baldwin's staff consists of two former Cadillac dialysis registered nurses who use the same skills and equipment and perform the same functions performed by the registered nurses at Cadillac.

We find that there is a commonality of day-to-day supervision between the nurses at Cadillac and the Baldwin RNs. The dialysis nurses at both facilities report to Cadillac Clinical Manager Wallington (or the supervisor covering for her)³ if they have problems within her purview, i.e., staffing. Because the clinical manager is not a dialysis-trained nurse, if dialysis nurses in Baldwin have problems regarding patients' physical problems, they speak to the same physician as the dialysis nurses at Cadillac. The clinical manager spends 40 hours a week at Cadillac and visits Baldwin every 2 weeks. Although the manager spends most of her time at Cadillac, the dialysis nurses at both facilities are supervised by the same person; and to the extent that the clinical manager actually performs supervision, they are all supervised to the same degree.

We also find that there is significant employee interchange of registered nurses between the two facilities. There are only two registered nurses at the Baldwin fa-

¹ While agreeing with his colleagues that the transferred registered nurses are an accretion to the existing unit, Member Devaney finds it unnecessary to rely on their discussion of the Board's decision in *Gitano*.

² The presumption arises in the health care industry as it does in other industries. *Manor Healthcare Corp.*, 285 NLRB 224 (1987).

³ Wallington is also the clinical manager of Cadillac's surgical services. There are other Cadillac clinical managers and clinical supervisors who supervise other sections at Cadillac.

cility. During the approximately 4-1/2-month period between the opening of the Baldwin facility and the instant hearing, Baldwin nurses filled in at Cadillac four-five times (one went to Cadillac three-four times, one once), an average of once a month. When either Baldwin nurse is unavailable for duty, Cadillac nurses are asked to fill in. This has happened between two-four times in the 4-1/2-month period. Although in raw numbers the interchange here appears to be relatively small, those numbers must be balanced against the fact that the entire Baldwin staff has filled in at Cadillac and because there are only two of them, their participation in interchange will continue to be either 50 percent or 100 percent—substantial figures to say the least.

The Employer treats Cadillac and Baldwin as separate profit making centers for administrative and accounting purposes and they are separately licensed. The payroll work for Baldwin is apparently carried out at Cadillac, although the pay structure is different as a result of the Employer's decision not to apply the Cadillac contract to Baldwin. The vice president of human resources of the Employer is ultimately responsible for personnel matters at both the Baldwin and Cadillac facilities. While Cadillac employs its own director of human resources, the clinical nurse from Cadillac who supervises the Baldwin registered nurses also apparently functions as the human resource manager at Baldwin. Baldwin's policy and procedural manual is based on Cadillac's manual, modified only to reflect the limited nature of health care service provided at Baldwin and the differences in the layout of the new facility. The procedures with respect to dialysis equipment remain virtually identical to those set forth in the Cadillac manual. Cadillac's technician maintains Baldwin's dialysis equipment during periodic visits. Patients have been transferred from Baldwin to Cadillac and the Baldwin registered nurses are in daily telephone communication with the dialysis unit at Cadillac regarding these patients.

The cases relied on by the Employer are distinguishable. In *Towne Ford Sales*, 270 NLRB 311 (1984), the Board refused to accrete employees who transferred to a new location across the street from the original facility where both facilities had their own onsite managers who hired employees and directed work in their own facility and where there was no day-to-day contact between employee groups. In *Compact Video Services*, 284 NLRB 117 (1987), the Board found that factors militating against accretion outweighed those in favor of accretion. Only one employee at the shipping and receiving facility shared supervision with employees at the video editing facility. No bargaining unit employees ever filled in for the shipping and receiving employees, nor did shipping and receiving fill in for unit employees. The majority of the editing employees per-

formed work of higher skill and creativity and for higher pay than the shipping and receiving employees. All but one shipping and receiving facility employee had been excluded from a unit of postproduction employees when they had worked for the employer purchased by Compact Video.

Here, by contrast, the factors in favor of accretion of the Baldwin registered nurses to the Cadillac unit—common skills and functions, common supervision, interchange, and daily telephone contact between the employee groups—outweigh factors militating against accretion—the 40-mile geographic distance between the two locations and the differences in hours of operation and pay structure. Although the Cadillac and Baldwin facilities are of unequal size and purpose, that fact would seem to weigh more heavily in favor of accreting the two dialysis RNs to the hospital unit rather than the reverse. In particular, we are not unmindful of the fact that a separate appropriate unit at Baldwin would consist of only two employees, not an irrelevant factor in the health care industry.⁴

In these circumstances, the presumption of a separate, appropriate unit at Baldwin has been rebutted. We find, therefore, that the Baldwin registered nurses are accreted to the Cadillac unit. *St. Regis Paper Co.*, 239 NLRB 688 (1978).

Although the Regional Director did not analyze the accretion issue in terms of the presumptive appropriateness of a separate Baldwin unit, he considered the same factors relied on here and reached the same conclusion, that the Baldwin registered nurses are appropriately accreted to the Cadillac unit. Accordingly, the Regional Director's decision is affirmed.

⁴ Health Care Bargaining Unit Rules, 54 FR at 16341, 284 NLRB at 1588 (1989). In the Rules, the Board stated:

we agree that units of two or three employees, or of similarly small numbers of employees, would in many cases be impractically small, especially in the health care industry. Where so few employees are involved, it can be argued with some degree of persuasiveness that despite the shared, unique concerns and backgrounds that would otherwise make the separate units appropriate, these concerns are outweighed by concerns over disproportionate, unjustified costs and undue proliferation of units. . . . [A] petitioned-for unit of five employees or fewer shall constitute an "extraordinary circumstance."

APPENDIX

Regional Director's Decision and Order

4. The Employer, Mercy Health Services North, a Division of Sisters of Mercy Health Corporation, owns and operates a hospital in Cadillac, Michigan, known as Mercy Hospital-Cadillac, a dialysis center in Baldwin, Michigan, known as the Baldwin Renal Care Clinic (Baldwin Clinic), as well as a hospital located in Grayling, Michigan, known as the Mercy Hospital-Grayling.

On June 5, 1990, the Petitioner in the instant case was certified as the exclusive bargaining agent of a unit of registered

nurses employed by the Employer at the Mercy Hospital-Cadillac.³ The Employer opened the Baldwin Clinic on June 1, 1991, in a location which is about 40 to 45 miles away from Mercy Hospital-Cadillac. Since its opening, the Baldwin Clinic has been staffed with two registered nurses who up until June 5 had been employed by the Employer at Mercy Hospital-Cadillac. The Petitioner herein seeks to have its bargaining unit at the Mercy Hospital-Cadillac clarified to include the registered nurses who, since June 5, 1991, have been employed at the Baldwin Clinic.

In or about November 1990, during the time when the Petitioner and the Employer were negotiating their first collective-bargaining agreement for the Cadillac RN unit, the Employer posted job vacancies for the RN positions at what was later to become the Baldwin Clinic. Two registered nurses, both members of the bargaining unit, bid on and were accepted for the RN positions for the Baldwin dialysis center. One of these registered nurses, Jim Lentz, was then a member of the Petitioner's bargaining team. During the negotiations, there was little, if any, discussion with respect to whether or not the registered nurses who were to be employed at the Baldwin Clinic would be included in the bargaining unit. The Petitioner did not demand that the recognition clause be amended to include these registered nurses. According to the Employer's witness, there was no discussion of the Baldwin facility at the bargaining table. The Union witness, Jim Lentz, recalled that there was some discussion of the new facility. However, he did not recall that the Union ever specifically requested that the registered nurses who were to be employed there be included in the Cadillac unit. The collective-bargaining agreement was ratified in April 1991 and went into effect on May 1, 1991.

On June 5, 1991, the Baldwin Clinic opened to carry out its dialysis treatment operations. Its only staff consisted of the two registered nurses who had transferred from Mercy Hospital-Cadillac. The two registered nurses who are employed at the Baldwin Clinic are supervised by Nancy Wallington, the clinical manager, who is stationed at Mercy Hospital-Cadillac and visits the Baldwin Clinic once every 2 weeks, for 1 day. She also directly supervises the registered nurses who work in the dialysis unit at Mercy Hospital-Cadillac.

The two registered nurses currently employed at the Baldwin Clinic received their dialysis training at Mercy Hospital-Cadillac. Jim Lentz was an RN in the dialysis unit at Cadillac at the time he was selected for the Baldwin position. Laurie Faris, the other RN now employed at Baldwin, had been a registered nurse in the Cadillac intensive care unit; after being selected for the Baldwin Clinic position, she trained in the dialysis unit at Cadillac before the opening of Baldwin.

The registered nurses employed at the Baldwin Clinic work Monday, Wednesday, and Friday, and their shift is generally from 5:30 a.m. to 6:30 p.m. On the other hand, Mercy Hospital-Cadillac is open 7 days a week, 24 hours each day. Registered nurses there cover shifts for the entire 24-hour pe-

riod. The registered nurses at Baldwin use the same type of equipment and have the same skills as their counterpart registered nurses in the dialysis unit at Cadillac. A technician from Cadillac visits the Baldwin Clinic periodically to maintain the equipment. Furthermore, the registered nurses at the Baldwin Clinic are in daily phone communication with the dialysis unit at Cadillac. Some patients have been transferred from Baldwin to Cadillac, especially those patients requiring acute care. Since June 5, 1991, there has continued to be some interchange of registered nurses between the two facilities. On two occasions, registered nurses from Cadillac have filled in at the Baldwin facility. On a handful of occasions, the two registered nurses from Baldwin have filled in at the Cadillac facility.

Because the registered nurses at the Cadillac facility have been covered by a collective-bargaining agreement, they have a different pay structure than do the registered nurses at Baldwin. Both Jim Lentz and Laurie Faris received the same rate of pay they had at Cadillac when they started at the Baldwin facility. However, since transferred to Baldwin, they have received raises under the merit pay system that Mercy Hospital Services North uses for its unrepresented employees, the same pay raise system that is in place at Mercy Hospital-Grayling.

The three facilities, Cadillac, Grayling, and Baldwin, are treated for administrative and accounting purposes as separate profit-making centers by the Employer and are licensed by the State as separate medical facilities. However, each is also an administrative segment of Mercy Health Services North. The payroll work for the Baldwin Clinic is apparently carried out at Mercy Hospital-Cadillac; however, the payroll checks come from Mercy Health Services North. The vice president of human resources of Mercy Health Services North is ultimately responsible for personnel matters at each of the three facilities. However, Cadillac and Grayling facilities each employ their own directors of human resources. Nancy Wallington, apparently functions as the human resource manager at Baldwin, inasmuch as she testified that with respect to human resource matters at the Baldwin facility, she reports directly to the Mercy Health Services North vice president of human resources. The Baldwin Clinic has issued its own policy and procedural manual. According to testimony, however, this policy and procedural manual is a modified version of what is in place in Cadillac. It was modified only to reflect the limited nature of health care services provided at Baldwin and the differences in the layout of the new facility. However, the procedures with respect to dialysis treatment remain virtually identical to those set forth in the Cadillac procedure manual.

The Board's policy is to find an accretion only where the additional employees sought to be included in the unit have little or no separate group identity, and thus cannot be considered to constitute a separate appropriate bargaining unit. Also, an accretion will only be found to have occurred when the employees sought to be added have an overwhelming community of interest with the preexisting unit. The Board follows a restrictive policy with respect to accretion because such a finding precludes employees from exercising their rights to choose their bargaining representative. See, e.g., *Town Ford Sales*, 270 NLRB 311 (1984), *enfd.* 759 F.2d 477 (9th Cir. 1985); *Compact Video Services*, 284 NLRB 117 (1987).

³ The certified unit is:

All regular full-time and part-time registered nurses employed by the Employer at its 400 Hobart Street, Cadillac, Michigan facility; but excluding casual employees, guards and supervisors as defined in the Act and all other professionals and non-professionals.

The criteria the Board examines to determine whether or not there is an accretion include: the integration of operations, the degree of interchange of employees, commonality of day-to-day supervision, similarity of working conditions, common control over labor relations, collective-bargaining history, and geographic proximity. *Compact Video Services*, supra. Furthermore, the Board has long held that during the term of a contract, unit clarification is not an appropriate procedure for upsetting an agreement or an established practice with respect to the unit placement of employees. See, e.g., *Massachusetts Teacher Assn.*, 236 NLRB 1427, 1429 (1976); *SunarHauserman*, 273 NLRB 1176, 1177 (1984); *Boston Cutting Die Co.*, 258 NLRB 771, 772 (1981).

After analyzing the record evidenced in accordance with the above-described criteria, I have concluded that the registered nurses do constitute an accretion to the unit of registered nurses employed by the Employer at the Cadillac facility. In essence, the Baldwin facility is a spinoff of the dialysis treatment unit in Cadillac. It is a satellite of and an integral part of the Cadillac center. The dialysis treatment, instead of continuing to be centralized in Cadillac, is now bifurcated into two treatment units. In support of this finding, I note that the RNs currently employed at the Baldwin Clinic worked in the bargaining unit in Cadillac until they were transferred to the new facility, received their training there, and since the opening of the new facility, have performed the same type of work, have used the same type of equipment, and are under the same supervision as the RNs employed in Cadillac in the dialysis unit. In performing their job duties, the RNs at Baldwin are in daily phone contact with the RNs at the Cadillac facility on patient care matters and, on occasion, there have been temporary transfers between the two facilities. The above factors, which strongly militate in favor of finding of an accretion, outweigh the geographic separation of the two facilities and the Employer established but small disparities between the terms and conditions of employment of the RNs at the two facilities. The differences in pay appear to be a result of the Employer's decision not to

treat them as bargaining unit employees, rather than any significant differences between the positions at the two facilities. See, e.g., *Universal Security Instruments*, 250 NLRB 661, 662, 670 (1980), *enfd.* in pertinent part 649 F.2d 247 (4th Cir. 1981). In finding an accretion herein, the concern expressed by the Board not to preclude the employees' free exercise of choice as to union representation is mitigated, since the grouping employed in Baldwin were a part of a unit constituency which had selected the union as their bargaining representative.

Finally, the brief bargaining history does not preclude the finding of accretion herein. Although the Petitioner did know of the Employer's plans to open the new facility during their negotiations, the exclusion or inclusion of the RNs selected for transfer to that facility was not discussed at the bargaining table, and the new positions did not come into existence until after the contract went into effect. Thus, it cannot be said that the Employer and Petitioner had an established practice or an agreement concerning whether the registered nurses employed at the Baldwin facility would be excluded from the unit. Cf. *St. Francis Hospital*, 282 NLRB 950, 951 (1987).

ORDER

It is hereby ordered that the unit represented by the Petitioner at Mercy Hospital-Cadillac is hereby clarified to include the registered nurses employed at the Baldwin Clinic. The following constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses employed by the Employer at its 400 Hobart Street, Cadillac, Michigan facility and at its 4967 Michigan Avenue, Baldwin, Michigan facility; but excluding guard and supervisors as defined in the Act and all other professionals and non-professionals.